

**James Madison to Edward Everett, August 28, 1830.
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TO EDWARD EVERETT.¹ MAD. MSS.

¹ This letter was printed by Edward Everett in the *North American Review*, for October, 1830, vol. 31, p. 537.

Augst. 28 1830.

Dr. Sir —I have duly recd. your letter in wch. you refer to the “nullifying doctrine,” advocated as a constitutional right by some of our distinguished fellow citizens; and to the proceedings of the Virga. Legislature in 98 & 99, as appealed to in behalf of that doctrine; and you express a wish for my ideas on those subjects.²

² Having received a copy of Senator Robert Y. Hayne's speeches on the constitution which began January 19, 1830, Madison wrote to him, the draft being dated “Apr. (say 3d or 4th)”:

“I recd. in due time your favor enclosing your two late speeches, and requesting my views of the subject they discuss. The speeches could not be read without leaving a strong impression of the ability & eloquence which have justly called forth the eulogies of the public. But there are doctrines espoused in them from which I am constrained to dissent. I allude particularly to the doctrine which I understand to assert that the States perhaps their Governments have, singly, a constitutional right to resist & by force annul within itself acts of the Government of the U. S. which it deems unauthorized by the Constitution of the U.

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S.; although such acts be not within the extreme cases of oppression, which justly absolve the State from the Constitutional compact to which it is a party.

“It appears to me that in deciding on the character of the Constitution of the U. S. it is not sufficiently kept in view that being an unprecedented modification of the powers of Govt. it must not be looked at thro' the refracting medium either of a consolidated Government, or of a confederated Govt; that being essentially different from both, it must be its own interpreter according to its text and *the facts of the case*.

“Its characteristic peculiarities are 1. the mode of its formation. 2. its division of the supreme powers of Govt. between the States in their united capacity, and the States in their individual capacities.

“1. It was formed not by the Governments of the States as the Federal Government superseded by it was formed; nor by a majority of the people of the U. S. as a single Community, in the manner of a consolidated Government.

“It was formed by the States, that is by the people of each State, acting in their highest sovereign capacity thro' Conventions representing them in that capacity, in like manner and by the same authority as the State Constitutions were formed; with this characteristic & essential difference that the Constitution of the U. S. being a compact among the States that is the people thereof making them the parties to the compact over one people for specified objects can not be revoked or changed at the will of any State within its limits as the Constitution of a State may be changed at the will of the State, that is the people who compose the State & are the parties to its constitution & retained their powers over it. The idea of a compact between the Governors & the Governed was exploded with the Royal doctrine that Government was held by some tenure independent of the people.

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“The Constitution of the U. S. is therefore within its prescribed sphere a Constitution in as strict a sense of the term as are the Constitutions of the individual States, within their respective spheres.

“2. And that it divides the supreme powers of Govt. between the two Governments is seen on the face of it; the powers of war & taxation, that is of the sword & the purse, of commerce of treaties &c. vested in the Govt. of the U. S. being of as high a character as any of the powers reserved to the State Govts.

“If we advert to the Govt. of the U. S. as created by the Constitution it is found also to be a Govt. in as strict a sense of the term, within the sphere of its powers, as the Govts. created by the Constitutions of the States are within their respective spheres. It is like them organized into a Legislative, Executive & Judicial Dept. It has, like them, acknowledged cases in which the powers of those Departments are to operate and the operation is to be the same in both; that is *directly* on the persons & things submitted to their power. The concurrent operation in certain cases is one of the features constituting the peculiarity of the system.

“Between these two Constitutional Govts., the one operating in all the States, the others operating in each respectively; with the aggregate powers of Govt. divided between them, it could not escape attention, that controversies concerning the boundary of Jurisdiction would arise, and that without some adequate provision for deciding them, conflicts of physical force might ensue. A political system that does not provide for a peaceable & authoritative termination of occurring controversies, can be but the name & shadow of a Govt. the very object and end of a real Govt. being the substitution of law & order for uncertainty confusion & violence.

“That a final decision of such controversies, if left to each of 13 State now 24 with a prospective increase, would make the Constitution & laws of the U. S. different in different

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States, was obvious; and equally obvious that this diversity of independent decisions must disorganize the the Government of the Union, and even decompose the Union itself.

“Against such fatal consequences the Constitution undertakes to guard 1. by declaring that the Constitution & laws of the States in their united capacity shall have effect, anything in the Constitution or laws of any State in its individual capacity to the contrary notwithstanding, by giving to the Judicial authority of the U. S. an appellate supremacy in all cases arising under the Constitution; & within the course of its functions, arrangements supposed to be justified by the necessity of the case; and by the agency of the people & Legislatures of the States in electing & appointing the Functionaries of the Common Govt. whilst no corresponding relation existed between the latter and the Functionaries of the States.

“2. Should these provisions be found notwithstanding the responsibility of the functionaries of the Govt. of the U. S. to the Legislatures & people of the States not to secure the State Govts. against usurpations of the Govt. of the United States there remains within the purview of the Constn. an impeachment of the Executive & Judicial Functionaries, in case of their participation in the guilt, the prosecution to depend on the Representatives of the people in one branch, and the trial on the Representatives of the States in the other branch of the Govt. of the U. S.

“3. The last resort within the purview of the Constn. is the process of amendment provided for by itself and to be executed by the States.

“Whether these provisions taken together be the best that might have been made; and if not, what are the improvements, that ought to be introduced, are questions altogether distinct from the object presented by your communication, which relates to the Constitution as it stands.

“In the event of a failure of all these Constitutional resorts against usurpations and abuses of power and of an accumulation thereof rendering passive obedience & nonresistance

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a greater evil than resistance and revolution, there can remain but one resort, the last of all, the appeal from the cancelled obligation of the Constitutional compact to original rights and the law of self-preservation. This is the *Ultima ratio*, under all Governments, whether consolidated, confederated, or partaking of both those characters. Nor can it be doubted that in such an extremity a single State would have a right, tho' it would be a natural not a *constitutional* Right to make the appeal. The same may be said indeed of particular portions of any political community whatever so oppressed as to be driven to a choice between the alternative evils.

“The proceedings of the Virginia Legislature (occasioned by the Alien and Sedition Acts) in which I had a participation, have been understood it appears, as asserting a Constitutional right in a single State to nullify laws of the U. S. that is to resist and prevent by force the execution of them, within the State.

“It is due to the distinguished names who have given that construction of the Resolutions and the Report on them to suppose that the meaning of the Legislature though expressed with a discrimination and fulness sufficient at the time may have been somewhat obscured by an oblivion of contemporary indications and impressions. But it is believed that by keeping in view distinctions (an inattention to which is often observable in the ablest discussions of the subjects embraced in those proceedings) between the Governments of the States & the States in the sense in which they were parties to the Constitution; between the several modes and objects of interposition agst. the abuses of Power; and more especially between interpositions within the purview of the Constitution, and interpositions appealing from the Constitution to the rights of nature, paramount to all Constitutions; with these distinctions kept in view, and an attention always of explanatory use to the views and arguments which are combated, a confidence is felt that the Resolutions of Virga. as vindicated in the Report on them, are entitled to an exposition shewing a consistency in their parts, and an inconsistency of the whole with the doctrine under consideration.

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“On recurring to the printed Debates in the House of Delegates on the occasion, which were ably conducted, and are understood to have been, for the most part at least, revised by the Speakers, the tenor of them does not disclose any reference to a constitutional right in an individual State to arrest by force the operation of a law of the U. S. Concert among the States for redress agst. the Alien & Sedition laws as acts of usurped power, was a leading sentiment, and the attainment of a Concert the immediate object of the course adopted, which was an invitation to the other States ‘to *concur* in declaring the acts to be unconstitutional, and to *co-operate* by the necessary & proper measures in maintaining unimpaired the authorities rights and liberties reserved to the States respectively or to the people.’ That by the necessary & proper measures to be concurrently & co-operatively taken were meant measures known to the Constitution, particularly the control of the Legislatures and people of the States over the Cong. of the U. S. cannot well be doubted.

“It is worthy of remark, and explanatory of the intentions of the Legislature, that the words ‘*and not law, but utterly null void & of no power or effect*’*

* Whether these words were in the draft from my pen or added before the Resolutions were introduced by the member who withdrew them I am not authorized to say, no Copy of the draft having been retained & memory not to be trusted after such a lapse of time. I certainly never disapproved the erasure of them.— *Madison's Note*.

which in the Resolutions before the House followed the word unconstitutional, were near the close of the debate stricken out by common consent. It appears that the words had been regarded as only surplusage by the friends of the Resolution; but lest they should be misconstrued into a nullifying import instead of a declaration of opinion, the word unconstitutional alone was retained, as more safe agst. that error. The term *nullification* to which such an important meaning is now attached, was never a part of the Resolutions and appears not to have been contained in the Kentucky Resolutions as *originally* passed, but to have been introduced at an after date.

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“Another and still more conclusive evidence of the intentions of the Legislature is given in their Address to their Constituents accompanying the publication of their Resolutions. The address warns them against the encroaching spirit of the General Government; argues the unconstitutionality of the Alien & Sedition laws; enumerates the other instances in which the Constitutional limits had been overleaped; dwells on the dangerous mode of deriving power by implication; and in general presses the necessity of watching over the consolidating tendency of the Federal policy. But nothing is said that can be understood to look to means of maintaining the rights of the States beyond the regular ones within the forms of the Constitution.

“If any further lights on the subject could be needed a very strong one is reflected from the answers given to the Resolutions by the States who protested against them. Their great objection, with a few undefined complaints of the spirit & character of the Resolutions, was directed against the assumed authority of a State Legislature to declare a law of the U. S. to be unconstitutional which they considered an unwarrantable interference with the exclusive jurisdiction of the Supreme Court of the U.S. Had the Resolutions been regarded as avowing & maintaining a right in an individual State to arrest by force the execution of a law of the U. S. it must be presumed, that it would have been a pointed and conspicuous object of their denunciation.

“In this review I have not noticed the idea entertained by some that disputes between the Government of the U. S. and those of the individual States may & must be adjusted by negotiation, as between independent Powers.

“Such a mode as the only one of deciding such disputes would seem to be as expressly at variance with the language and provisions of the Constitution as in a practical view it is pregnant with consequences subversive of the Constitution. It may have originated in a supposed analogy to the negotiating process in cases of disputes between separate branches or Departments of the same Government. but the analogy does not exist. In the case of disputes between independent parts of the same Government. neither of them being able

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to consummate its pretensions, nor the Govt. to proceed without a co-operation of the several parts necessity brings about an adjustment. In disputes between a State Govt. and the Govt. of the U. S. the case is both theoretically & practically different; each party possessing all the Departments of an organized Governmt. Legislative Ex. & Judl.; and having each a physical force at command.

“This idea of an absolute separation & independence between the Govt. of the U. S. and the State Govts. as if they belonged to different nations alien to each other has too often tainted the reasoning applied to Constitutional questions. Another idea not less unsound and sometimes presenting itself is, that a cession of any part of the rights of sovereignty is inconsistent with the nature of sovereignty, or at least a degradation of it. This would certainly be the case if the cession was not both mutual & equal, but when there is both mutuality & equality there is no real sacrifice on either side, each gaining as much as it grants, and the only point to be considered is the expediency of the compact and that to be sure is a point that ought to be well considered. On this principle it is that Treaties are admissible between Independent powers, wholly alien to each other, although privileges may be granted by each of the parties at the expense of its internal jurisdiction. On the same principle it is that individuals entering into the social State surrender a portion of their equal rights as men. If a part only made the surrender, it would be a degradation; but the surrenders being mutual, and each gaining as much authority over others as is granted to others over him, the inference is mathematical that in theory nothing is lost by any; however different the result may be in practice.

“I am now brought to the proposal which claims for the States respectively a right to appeal agst. an exercise of power by the Govt. of the U. S. which by the States is decided to be unconstitutional, to a final decision by $\frac{3}{4}$ of the parties to the Constitution. With every disposition to take the most favorable view of this expedient that a high respect for its Patrons could prompt I am compelled to say that it appears to be either not necessary or inadmissible.

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"I take for granted it is not meant that pending the appeal the offensive law of the U. S. is to be suspended within the State. Such an effect would necessarily arrest its operation everywhere, a uniformity in the operation of laws of the U. S. being indispensable not only in a Constitutional and equitable, but in most cases in a practicable point of view, and a final decision adverse to that of the Appellant State would afford grounds to all kinds of complaint which need not be traced.

"But aside from those considerations, it is to be observed that the effect of the appeal will depend wholly on the form in which the case is proposed to the Tribunal which is to decide it.

"If $\frac{3}{4}$ of the States can sustain the State in its decision it would seem that this extra constitutional course of proceeding might well be spared; inasmuch as $\frac{2}{8}$ can institute and $\frac{3}{4}$ can effectuate an amendment of the Constitution, which would establish a permanent rule of the highest authority, instead of a precedent of construction only.

"If on the other hand $\frac{3}{4}$ are required to reverse the decision of the State it will then be in the power of the smallest fraction over $\frac{1}{4}$ (of 7 States for example out of 24) to give the law to 17 States, each of the 17 having as parties to the Constitutional compact an equal right with each of the 7 to expound & insist on its exposition. That the 7 might in particular cases be right and the 17 wrong, is quite possible. But to establish a positive & permanent rule giving such a power to such a minority, over such a majority, would overturn the first principle of a free Government and in practice could not fail to overturn the Govt. itself.

"It must be recollected that the Constitution was proposed to the people of the States as a *whole*, and unanimously adopted as a *whole*, if being a part of the Constitution that not less than $\frac{3}{4}$ should be competent to make any alteration in what had been unanimously agreed to. So great is the caution on this point, that in two cases where peculiar interests were at stake a majority even of $\frac{3}{4}$ are distrusted and a unanimity required to make any change affecting those cases.

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“When the Constitution was adopted as a whole, it is certain that there are many of its parts which if proposed by themselves would have been promptly rejected. It is far from impossible that every part of a whole would be rejected by a majority and yet the whole be unanimously accepted. Constitutions will rarely, probably never be formed without mutual concessions, without articles conditioned on & balancing each other. Is there a Constitution of a single State out of the 24 that would bear the experiment of having its component parts submitted to the people separately, and decided on according to their insulated merits.

“What the fate of the Constitution of the U. S. would be if a few States could expunge parts of it most valued by the great majority, and without which the great majority would never have agreed to it, can have but one answer.

“The difficulty is not removed by limiting the process to cases of construction. How many cases of that sort involving vital texts of the Constitution, have occurred? how many now exist? How many may hereafter spring up? How many might be plausibly enacted, if entitled to the privilege of a decision in the mode proposed.

“Is it certain that the principle of that mode may not reach much farther than is contemplated? If a single State can of right require $\frac{3}{4}$ of its Co-States to overrule its exposition of the Constitution, because that proportion is authorized to amend it, is the plea less plausible that as the Constitution was unanimously formed it ought to be unanimously expounded.

“The reply to all such suggestions must be that the Constitution is a compact; that its text is to be expounded according to the provision for it making part of that Compact; and that none of the parties can rightfully violate the expounding provision, more than any other part. When such a right accrues as may be the case, it must grow out, of abuses of the Constitution amounting to a release of the sufferers from their allegiance to it.

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“Will you permit me Sir to refer you to Nos. 39 & 44 of the Federalist Edited at Washington by Gideon, which will shew the views taken on some points of the Constitution at the period of its adoption. I refer to that Edition because none preceding it are without errors in the names prefixed to the several papers as happens to be the case in No. 51 for which you suppose Col: Hamilton to be responsible. The errors were occasioned by a memorandum of his penned probably in haste, & partly in a lumping way. It need not be remarked that they were pure inadvertences.

“I fear Sir I have written you a letter the length of which may accord as little with your patience, as I am sorry to foresee that the scope of parts of it must do with your judgment. But a naked opinion did not appear respectful either to the subject or to the request with which you honored me, and notwithstanding the latitude given to my pen, I am not unaware that the views it presents may need more of development in some instances, if not more exactness of discrimination in others, than I could bestow on them. The subject has been so expanded and recd. such ramifications & refinements, that a full survey of it is a task agst. which my age alone might justly warn me.

“The delay Sir in making the acknowledgments I owe you was occasioned for a time by a crowd of objects which awaited my return from a long absence at Richmond, and latterly by an indisposition from which I am not yet entirely recovered. I hope you will be good eno' to accept these apologies, and with them assurances of my high esteem & my cordial salutations, in which Mrs. M. begs to be united with me, as I do with her in a respectful tender of them to Mrs. Hayne.”— *Chic. Hist. Soc. MSS.*

August 20, 1830, Madison wrote to Everett:

“There is not I am persuaded the slightest ground for supposing that Mr. Jefferson departed from his purpose not to furnish Kentucky with a set of Resolutions for the year '99. It is certain that he penned the Resolutions of '98, and, probably in the terms in which they passed. It was in those of '99 that the word ‘nullification’ appears.

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"Finding among my pamphlets a copy of the debates in the Virginia House of Delegates on the Resolutions of '98, and one of an address of the two Houses to their constituents on the occasion, I enclose them for your perusal; and I add another, though it is less likely to be new to you, the 'Report of a Committee of the S. Carolina House of Representatives, Decr. 9, 1828,' in which the nullifying doctrine is stated in the precise form in which it is now asserted. There was a protest by the minority in the Virginia Legislature of '98 against the Resolutions, but I have no copy. The matter of it may be inferred from the speeches in the Debates. I was not a member in that year, though the penman of the Resolutions, as now supposed."— *Mad. MSS.*

Again on September 10, 1830, he wrote to Everett:

"Since my letter in which I expressed a belief that there was no ground for supposing that the Kentucky Resolutions of 1799, in which the term 'nullification' appears, were drawn by Mr. Jefferson, I infer from a manuscript paper containing the terra just noticed, that altho he probably had no agency in the draft, nor even any knowledge of it at the time, yet that the term was borrowed from that source. It may not be safe, therefore, to rely on his to Mr. W. C. Nicholas printed in his Memoir & Correspondence, as a proof that he had no connection with or responsibility for the use of such terra on such an occasion. Still I believe that he did not attach to it the idea of a constitutional right in the sense of S. Carolina, but that of a natural one in cases justly appealing to it."— *Mad. MSS.*

On September 23, 1830, he wrote to Nicholas P. Trist:

"In a letter, lately noticed, from Mr. Jefferson, dated November 17, 1799, he '*incloses me a copy of the draught of the Kentucky Resolves*', (a press copy of his own manuscript). Not a word of explanation is mentioned. It was probably sent, and possibly at my request, in consequence of my being a member elect of the Virga Legislature of 1799, which would have to vindicate its contemporary Resolns. of -98. It is remarkable that the paper differs both from the Kentucky Resolutions of -98, & from those of -99. It agrees with the former

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in the main and must have been the pattern of the Resolns. of that year, but contains passages omitted in them, which employ the terms nullification & nullifying; and it differs in the quantity of matter from the Resolutions of -99, but agrees with them in a passage which employs that language, and would seem to have been the origin of it. I conjecture that the correspondent in Kentucky, Col. George Nicholas, probably might think it better to leave out particular parts of the draught than risk a misconstruction or misapplication of them; and that the paper might, notwithstanding, be within the reach & use of the Legislature of -99, & furnish the phraseology containing the term 'nullification.' Whether Mr. Jefferson had noted the difference between his draught & the Resolns. of -98 (he could not have seen those of -99, which passed Novr. 14,) does not appear. His files, particularly his correspondence with Kentucky, must throw light on the whole subject. This aspect of the case seems to favor a recall of the communication if practicable. Though it be true that Mr Jefferson did not draught the Resolutions of -99, yet a denial of it, simply, might imply more than wd. be consistent with a knowledge of what is here stated."— *Mad. MSS.*

See Warfield's *Kentucky Resolutions of 1798*; also, for Jefferson's correspondence, his Writings (P. L. Ford, Federal Edition) viii., 57, *et seq.*

I am aware of the delicacy of the task in some respects; and the difficulty in every respect of doing full justice to it. But having in more than one instance complied with a like request from other friendly quarters, I do not decline a sketch of the views which I have been led to take of the doctrine in question, as well as some others connected with them; and of the grounds from which it appears that the proceedings of Virginia have been misconceived by those who have appealed to them. In order to understand the true character of the Constitution of the U. S. the error, not uncommon, must be avoided, of viewing it through the medium either of a consolidated Government or of a confederated Govt. whilst it is neither the one nor the other, but a mixture of both. And having in no model the similitudes & analogies applicable to other systems of Govt it must more than any other be its own interpreter, according to its text & *the facts of the case.*

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From these it will be seen that the characteristic peculiarities of the Constitution are 1. The mode of its formation, 2. The division of the supreme powers of Govt. between the States in their united capacity and the States in their individual capacities.

1. It was formed, not by the Governments of the component States, as the Federal Govt. for which it was substituted was formed; nor was it formed by a majority of the people of the U. S. as a single community in the manner of a consolidated Government.

It was formed by the States—that is by the people in each of the States, acting in their highest sovereign capacity; and formed, consequently by the same authority which formed the State Constitutions.

Being thus derived from the same source as the Constitutions of the States, it has within each State, the same authority as the Constitution of the State; and is as much a Constitution, in the strict sense of the term, within its prescribed sphere, as the Constitutions of the States are within their respective spheres; but with this obvious & essential difference, that being a compact among the States in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered or annulled at the will of the States individually, as the Constitution of a State may be at its individual will.

2. And that it divides the supreme powers of Govt. between the Govt. of the United States, & the Govts. of the individual States, is stamped on the face of the instrument; the powers of war and of taxation, of commerce & of treaties, and other enumerated powers vested in the Govt. of the U. S. being of as high & sovereign a character as any of the powers reserved to the State Govts.

Nor is the Govt. of the U. S. created by the Constitution, less a Govt. in the strict sense of the term, within the sphere of its powers, than the Govts. created by the constitutions of the States are within their several spheres. It is like them organized into Legislative,

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Executive, & Judiciary Departments. It operates like them, directly on persons & things. And, like them, it has at command a physical force for executing the powers

committed to it. The concurrent operation in certain cases is one of the features marking the peculiarity of the system.

Between these different constitutional Govts.—the one operating in all the States, the others operating separately in each, with the aggregate powers of Govt. divided between them, it could not escape attention that controversies would arise concerning the boundaries of jurisdiction; and that some provision ought to be made for such occurrences. A political system that does not provide for a peaceable & authoritative termination of occurring controversies, would not be more than the shadow of a Govt.; the object & end of a real Govt. being the substitution of law & order for uncertainty confusion, and violence.

That to have left a final decision in such cases to each of the States, then 13 & already 24, could not fail to make the Constn. & laws of the U. S. different in different States was obvious; and not less obvious, that this diversity of independent decisions, must altogether distract the Govt. of the Union & speedily put an end to the Union itself. A uniform authority of the laws, is in itself a vital principle. Some of the most important laws could not be partially executed They must be executed in all the States or they could be duly executed in none. An impost or an excise, for example, if not in force in some States, would be defeated in others. It is well known that this was among the lessons of experience wch. had a primary influence in bringing about the existing Constitution. A loss of its general authy. would moreover revive the exasperating questions between the States holding ports for foreign commerce and the adjoining States without them, to which are now added all the inland States necessarily carrying on their foreign commerce through other States.

To have made the decisions under the authority of the individual States, co-ordinate in all cases with decisions under the authority of the U. S. would unavoidably produce collisions incompatible with the peace of society, & with that regular & efficient administration which

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is the essence of free Govts. Scenes could not be avoided in which a ministerial officer of the U. S. and the correspondent officer of an individual State, would have rencounters in executing conflicting decrees, the result of which would depend on the comparative force of the local posse attending them, and that a casualty depending on the political opinions and party feelings in different States.

To have referred every clashing decision under the two authorities for a final decision to the States as parties to the Constitution, would be attended with delays, with inconveniences, and with expenses amounting to a prohibition of the expedient, not to mention its tendency to impair the salutary veneration for a system requiring such frequent interpositions, nor the delicate questions which might present themselves as to the form of stating the appeal, and as to the Quorum for deciding it.

To have trusted to negotiation, for adjusting disputes between the Govt. of the U. S. and the State Govts. as between independent & separate sovereignties, would have lost sight altogether of a Constitution & Govt. for the Union; and opened a direct road from a failure of that resort, to the ultima ratio between nations wholly independent of and alien to each other. If the idea had its origin in the process of adjustment between separate branches of the same Govt. the analogy entirely fails. In the case of disputes between independent parts of the same Govt. neither part being able to consummate its will, nor the Gov. to proceed without a concurrence of the parts, necessity brings about an accommodation. In disputes between a State Govt. and the Govt. of the U. States the case is practically as well as theoretically different; each party possessing all the Departments of an organized Govt. Legisl. Ex. & Judiciary; and having each a physical force to support its pretensions. Although the issue of negotiation might sometimes

avoid this extremity, how often would it happen among so many States, that an unaccommodating spirit in some would render that resource unavailing? A contrary supposition would not accord with a knowledge of human nature or the evidence of our own political history.

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The Constitution, not relying on any of the preceding modifications for its safe & successful operation, has expressly declared on the one hand; 1. "That the Constitution, and the laws made in pursuance thereof, and all Treaties made under the authority of the U. S. shall be the supreme law of the land; 2. That the judges of every State shall be bound thereby, anything in the Constn or laws of any State to the contrary notwithstanding; 3. That the judicial power of the U. S. shall extend to all cases in law & equity arising under the Constitution, the laws of the U. S. and Treaties made under their authority &c."

On the other hand, as a security of the rights & powers of the States in their individual capacities, agst. an undue preponderance of the powers granted to the Government over them in their united capacity, the Constitution has relied on, 1. The responsibility of the Senators and Representatives in the Legislature of the U. S. to the Legislatures & people of the States. 2. The responsibility of the President to the people of the U. States; & 3. The liability of the Ex. and Judiciary functionaries of the U. S. to impeachment by the Representatives of the people of the States, in one branch of the Legislature of the U. S. and trial by the Representatives of the States, in the other branch; the State functionaries, Legislative, Executive, & judiciary, being at the same time in their appointment & responsibility, altogether independent of the agency or authority of the U. States.

How far this structure of the Govt. of the U. S. be adequate & safe for its objects, time alone can absolutely determine. Experience seems to have shown that whatever may grow out of future stages of our national career, there is as yet a sufficient controul in the popular will over the Executive & Legislative Departments of the Govt. When the Alien & Sedition laws were passed in contravention to the opinions and feelings of the community, the first elections that ensued put an end to them. And whatever may have been the character of other acts in the judgment of many of us, it is but true that they have generally accorded with the views of a majority of the States and of the people. At the present day it seems well understood that the laws which have created most dissatisfaction have had a

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like sanction without doors; and that whether continued varied or repealed, a like proof will be given of the sympathy & responsibility of the Representative Body to the Constituent Body. Indeed, the great complaint now is, not against the want of this sympathy and responsibility, but against the results of them in the legislative policy of the nation.

With respect to the Judicial power of the U. S. and the authority of the Supreme Court in relation to the boundary of jurisdiction between the Federal & the State Govts. I may be permitted to refer to the [thirty-ninth] number of the "Federalist" for the light in which the subject was regarded by its writer, at the period when the Constitution was depending; and it is believed that the same was the prevailing view then taken of it, that the same view has continued to prevail, and that it does so at this time

notwithstanding the eminent exceptions to it.

But it is perfectly consistent with the concession of this power to the Supreme Court, in cases falling within the course of its functions, to maintain that the power has not always been rightly exercised. To say nothing of the period, happily a short one, when judges in their seats did not abstain from intemperate & party harangues, equally at variance with their duty and their dignity, there have been occasional decisions from the Bench which have incurred serious & extensive disapprobation. Still it would seem that, with but few exceptions, the course of the judiciary has been hitherto sustained by the predominant sense of the nation.

Those who have denied or doubted the supremacy of the judicial power of the U. S. & denounce at the same time nullifying power in a State, seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition & execution of the law; nor to the destruction of all equipoise between the Federal Govt. and the State governments, if, whilst the functionaries of the Fedl. Govt. are directly or indirectly elected by and responsible to the States & the functionaries of the States are in their appointments & responsibility wholly independent of the U. S. no

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constitutional control of any sort belonged to the U. S. over the States. Under such an organization it is evident that it would be in the power of the States individually, to pass unauthorized laws, and to carry them into complete effect, anything in the Constn. and laws of the U. S. to the contrary notwithstanding. This would be a nullifying power in its plenary character; and whether it had its final effect, thro the Legislative Ex. or Judiciary organ of the State, would be equally fatal to the constitutional relation between the two Govts.

Should the provisions of the Constitution as here reviewed be found not to secure the Govt. & rights of the States agst. usurpations & abuses on the part of the U. S. the final resort within the purview of the Constnt. lies in an amendment of the Constn. according to a process applicable by the States.

And in the event of a failure of every constitutional resort, and an accumulation of usurpations & abuses, rendering passive obedience & non-resistance a greater evil, than resistance & revolution, there can remain but one resort, the last of all, an appeal from the cancelled obligations of the constitutional compact, to original rights & the law of self-preservation. This is the ultima ratio under all Govt. whether consolidated, confederated, or a compound of both; and it cannot be doubted that a single member of the Union, in the extremity supposed, but in that only would have a right, as an extra & ultra constitutional right, to make the appeal.

This brings us to the expedient lately advanced, which claims for a single State a right to appeal agst. an exercise of power by the Govt. of the U. S. decided by the State to be unconstitutional, to the parties of the Const. compact; the decision of the State to have the effect of nullifying the act of the Govt. of the U. S. unless the decision of the State be reversed by three-fourths of the parties.

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The distinguished names & high authorities which appear to have asserted and given a practical scope to this doctrine, entitle it to a respect which it might be difficult otherwise to feel for it.

If the doctrine were to be understood as requiring

the threefourths of the States to sustain, instead of that proportion to reverse, the decision of the appealing State, the decision to be without effect during the appeal, it wd. be sufficient to remark, that this extra constl. course might well give way to that marked out by the Const. which authorizes $\frac{2}{3}$ of the States to institute and $\frac{3}{4}$ to effectuate, an amendment of the Constn. establishing a permanent rule of the highest authy in place of an irregular precedent of construction only.

But it is understood that the nullifying doctrine imports that the decision of the State is to be presumed valid, and that it overrules the law of the U. S. unless overruled by $\frac{3}{4}$ of the States.

Can more be necessary to demonstrate the inadmissibility of such a doctrine than that it puts it in the power of the smallest fraction over $\frac{1}{4}$ of the U. S.—that is, of 7 States out of 24—to give the law and even the Constn. to 17 States, each of the 17 having as parties to the Constn. an equal right with each of the 7 to expound it & to insist on the exposition. That the 7 might, in particular instances be right and the 17 wrong, is more than possible. But to establish a positive & permanent rule giving such a power to such a minority over such a majority, would overturn the first principle of free Govt. and in practice necessarily overturn the Govt. itself.

It is to be recollected that the Constitution was proposed to the people of the States as a *whole*, and unanimously adopted by the States as a *whole*, it being a part of the Constitution that not less than $\frac{3}{4}$ of the States should be competent to make any alteration in what had been unanimously agreed to. So great is the caution on this point, that in two

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cases when peculiar interests were at stake, a proportion even of $\frac{3}{4}$ is distrusted, and unanimity required to make an alteration.

When the Constitution was adopted as a whole, it is certain that there were many parts which if separately proposed, would have been promptly rejected. It is far from impossible, that every part of the Constitution might be rejected by a majority, and yet, taken together as a whole be unanimously accepted. Free constitutions will rarely if ever be formed without reciprocal concessions; without articles conditioned on & balancing each other. Is there a constitution of a single State out of the 24 that wd. bear the experiment of having its component parts submitted to the people & separately decided on?

What the fate of the Constitution of the U. S. would be if a small proportion of States could expunge parts of it particularly valued by a large majority, can have but one answer.

The difficulty is not removed by limiting the doctrine to cases of construction. How many cases of that sort, involving cardinal provisions of the Constitution, have occurred? How many now exist? How many may hereafter spring up? How many might be ingeniously created, if entitled to the privilege of a decision in the mode proposed?

Is it certain that the principle of that mode wd. not reach farther than is contemplated. If a single State can of right require $\frac{3}{4}$ of its co-States to overrule its exposition of the Constitution, because that proportion is authorized to amend it, would the plea be less plausible that, as the Constitution was unanimously established, it ought to be unanimously expounded?

The reply to all such suggestions seems to be unavoidable and irresistible, that the Constitution is a compact; that its text is to be expounded according to the provision for expounding it, making a part of the compact; and that none of the parties can rightfully renounce the expounding provision more than any other part. When such a right accrues,

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as it may accrue, it must grow out of abuses of the compact releasing the sufferers from their fealty to it.

In favour of the nullifying claim for the States individually, it appears, as you observe, that the proceedings of the Legislature of Virga. in 98 & 99 agst., the Alien and Sedition Acts are much dwelt upon.

It may often happen, as experience proves, that erroneous constructions, not anticipated, may not be sufficiently guarded against in the language used; and it is due to the distinguished individuals who have misconceived the intention of those proceedings to suppose that the meaning of the Legislature, though well comprehended at the time, may not now be obvious to those unacquainted with the cotemporary indications and impressions.

But it is believed that by keeping in view the distinction between the Govt. of the States & the States in the sense in which they were parties to the Constn.; between the rights of the parties, in their concurrent and in their individual capacities; between the several modes and objects of interposition agst. the abuses of power, and especially between interpositions within the purview of the Constn. & interpositions appealing from the Constn. to the rights of nature paramount to all Constitutions; with these distinctions kept in view, and an attention, always of explanatory use, to the views & arguments which were combated, a confidence is felt, that the Resolutions of Virginia, as vindicated in the Report on them, will be found entitled to an exposition, showing a consistency in their parts and an inconsistency of the whole with the doctrine under consideration.

That the Legislature cd. not have intended to sanction such a doctrine is to be inferred from the debates in the House of Delegates, and from the address of the two Houses to their constituents on the subject of the resolutions. The tenor of the debates wch. were ably conducted and are understood to have been revised for the press by most, if not all, of the speakers, discloses no reference whatever to a constitutional right in

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an individual State to arrest by force the operation of a law of the U. S. Concert among the States for redress against the alien & sedition laws, as acts of power, was a leading sentiment, and the attainment of a concert the immediate object of the course adopted by the Legislature, which was that of inviting the other States “to *concur* in declaring the acts to be unconstitutional, and to *co-operate* by the necessary & proper measures in maintaining unimpaired the authorities rights & liberties reserved to the States respectively & to the people.” That by the necessary and proper measures to be *concurrently* and co-operatively taken, were meant measures known to the Constitution, particularly the ordinary controul of the people and Legislatures of the States over the Govt. of the U. S. cannot be doubted; and the interposition of this controul as the event showed was equal to the occasion.

It is worthy of remark, and explanatory of the intentions of the Legislature, that the words “not law, but utterly null, void, and of no force or effect,” which had followed, in one of the Resolutions, the word “unconstitutional,” were struck out by common consent. Tho the words were in fact but synonymous with “unconstitutional,” yet to guard against a misunderstanding of this phrase as more than declaratory of opinion, the word unconstitutional alone was retained, as not liable to that danger.

The published address of the Legislature to the people their constituents affords another conclusive evidence of its views. The address warns them against the encroaching spirit of the Genl. Govt., argues the unconstitutionality of the alien & sedition acts, points to other instances in which the constl. limits had been overleaped; dwells upon the dangerous mode of deriving power by implications; and in general presses the necessity of watching over the consolidating tendency of the Fedl. policy. But nothing is sd. that can be understood to look to means of maintaining the rights of the States beyond the regular ones within the forms of the Constn.

If any farther lights on the subject cd. be needed, a very strong one is reflected in the answers to the Resolutions by the States which protested agst. them. The main objection

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to these, beyond a few general complaints agst. the inflammatory tendency of the resolutions was directed agst. the assumed authy. of a State Legisle. to declare a law of the U. S. unconstitutional, which they pronounced an unwarrantable interference with the exclusive jurisdiction of the Supreme Ct. of the U.S. Had the resolns. been regarded as avowing & maintaining a right in an indivl. State, to arrest by force the execution of a law of the U. S. it must be presumed that it wd have been a conspicuous object of their denunciation.